

THIS DISPOSITION IS
NOT CITABLE AS
PRECEDENT OF THE TTAB

Mailed: September 20, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Traditional Medicinals, Inc.
v.
Heartland Brewery, Inc.

Opposition No. 91159010
to application Serial No. 78187867
filed on November 22, 2002

Jay H. Geller of Jay H. Geller, a Professional Corporation,
for Traditional Medicinals, Inc.

Marc A. Lieberstein of Pitney Hardin LLP for Heartland
Brewery, Inc.

Before Chapman, Grendel and Zervas, Administrative Trademark
Judges.

Opinion by Chapman, Administrative Trademark Judge:

Traditional Medicinals, Inc. (a California corporation)
has opposed the application of Heartland Brewery, Inc. (a
New York corporation) to register on the Principal Register
the mark MOTHER'S MILK MAIBOCK for "beer" in International
Class 32.¹

¹ Application Serial No. 78187867, filed November 22, 2002, is
based on applicant's assertion of a bona fide intention to use
the mark in commerce on the identified goods. Upon request of
the Examining Attorney, applicant disclaimed the word "Maibock."

Opposer asserts as grounds for opposition that since 1980 opposer has used the mark MOTHER'S MILK for herb teas and for dietary and nutritional supplements in the nature of herb teas; that opposer owns Registration Nos. 1265889 and 2176476, both for the mark MOTHER'S MILK, for "herb tea" and "dietary and nutritional supplements in the nature of her[b]al teas," respectively;² and that applicant's mark, when used on its goods, so resembles opposer's previously used and registered mark, as to be likely to cause confusion, mistake, or deception.

In its answer applicant denies the salient allegations of the notice of opposition.³

² Registration No. 1265889, issued January 31, 1984, Section 8 affidavit accepted, Section 15 affidavit acknowledged, renewed.

Registration No. 2176476, issued July 28, 1998, Section 8 affidavit accepted, Section 15 affidavit acknowledged.

³ Applicant pleaded, as a putative "affirmative defense," that "the term MOTHER'S MILK as it appears in the alleged marks asserted by Opposer is non-distinctive, descriptive and/or generic in connection with its goods pursuant to [Section 14(3) of the Trademark Act] 15 U.S.C. §1064(3)." This is an impermissible collateral attack on opposer's pleaded registrations. See Trademark Rules 2.106(b)(2)(i) and (ii). As applicant did not file a counterclaim to cancel either of opposer's pleaded registrations, this "affirmative defense" will not be further considered. See *Food Specialty Co., Inc. v. Standard Products Company, Inc.*, 406 F.2d 1397, 161 USPQ 46 (CCPA 1969). See also, TBMP §311.02(b) (2d ed. rev. 2004). In any event, applicant neither pursued this defense at trial nor argued it in its brief.

The second sentence of the first "affirmative defense," as well as the second "affirmative defense," are likewise not "affirmative defenses" under Fed. R. Civ. P. 8(c), but are acceptable pleadings as they constitute further information relating to applicant's denial of opposer's likelihood of confusion claim.

The Record

The record consists of the pleadings; the file of applicant's involved application; the testimony, with exhibits, of Drake Sadler, opposer's CEO;⁴ opposer's notice of reliance on third-party registrations; and applicant's notice of reliance on (i) third-party registrations, (ii) third-party applications, (iii) printouts of pages from online publications, (iv) printouts from various websites, (v) a copy of opposer's deposition of Drake Sadler, and (vi) a reference that applicant will rely on the documents in opposer's notice of reliance.

Both parties filed briefs on the case. Neither party requested an oral hearing.

There are evidentiary matters we decide at the outset. Opposer objected to applicant's notice of reliance on the basis that the third-party applications and registrations "have no probative value" or "have very limited probative value" (opposer's objections to evidence, pp. 1 and 2); that the printouts from online publications are "hearsay, have no foundation and are totally unreliable" and are not self-authenticating (opposer's objections to evidence, p. 2); that the printouts from websites are also hearsay, have no foundation, are unreliable and are not self-authenticating;

⁴ Applicant did not attend the deposition of, nor cross-examine, Mr. Sadler.

and that applicant's notice of reliance on opposer's Sadler deposition transcript should be stricken as it is already in the record.

Applicant responded to opposer's evidentiary objections, and opposer argued in reply thereto that applicant stated "the Board may disregard [applicant's] Notice of Reliance" (applicant's brief, p. 6) and thus the Board should "accede to Applicant's request" (opposer's reply brief, p. 2) and strike all of applicant's notice of reliance.

However, applicant's complete statement was "while Applicant believes the Board should take Applicant's Notice of Reliance evidence into consideration, Applicant submits that the Board may disregard its Notice of Reliance, because ultimately, the Board need not consider any of the evidence in order to realize that no likelihood of confusion exists in this situation." (Applicant's brief, p. 6). Applicant then argued the merits of opposer's objections to applicant's evidence.

The Board does not construe applicant's approach as applicant's concession of opposer's objections to applicant's notice of reliance. Therefore, we will decide opposer's objections on the merits.

Opposer's objections to the third-party applications and registrations clearly relate not to the admissibility of

the documents, but rather to the probative value thereof. This material is admissible under Trademark Rule 2.122(e), and opposer's objections thereto are overruled.

Opposer's objections to the printouts of pages from various websites, including from online publications, are well taken and are sustained. As Internet materials are transitory in nature, they are not self-authenticating and therefore are not admissible under Trademark Rule 2.122(e) as printed publications. See *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1370 (TTAB 1998). See also, TBMP §704.08 (2d ed. rev. 2004).

Applicant's "notice of reliance" on opposer's deposition of Drake Sadler and applicant's statement in its notice of reliance that it intends to rely on the documents in opposer's notice of reliance, are both totally unnecessary. Evidence put into the record by one party is in the record for all purposes and the adverse party need not (and should not) enter the identical material into the record.

In sum, applicant's notice of reliance Exhibit Nos. 1-12 (third-party applications and registrations) have been considered herein for whatever limited probative value they have; and its notice of reliance Exhibit Nos. 13-52 have not been considered.

Next, we determine the requests of the parties for judicial notice of certain matters. Applicant requests that the Board take judicial notice that: (i) "Applicant is a brew-pub restaurant which brews beers for distribution exclusively through its restaurants" (brief, p. 19), and (ii) "dietary supplements and herbal teas designed to foster lactation for nursing mothers are not going to be sold in brew-pubs" (brief, p. 20). Applicant's requests for judicial notice are denied because neither of these are the kind of facts that are appropriate for judicial notice. See TBMP §704.12(a) (2d ed. rev. 2004).

Opposer requests that the Board take judicial notice of "16 CFR 16.21 which sets forth the Federal government's alcohol warning: [regarding drinking alcoholic beverages during pregnancy]" (brief, p. 6). However, opposer did not provide a copy of the regulation, and thus, the Board will not take judicial notice thereof. See *The Quaker Oats Company v. Acme Feed Mills, Inc.*, 192 USPQ 653, footnote 9 (TTAB 1976); and *Litton Business Systems, Inc. v. J.G. Furniture Co., Inc.*, 190 USPQ 431, 433 (TTAB 1976).

In its brief (p. 11), applicant cited to a few Board decisions which were designated by the Board as nonprecedential. Citation to nonprecedential decisions is improper. See *General Mills Inc. v. Health Valley Foods*, 24

USPQ2d 1270, footnote 9 (TTAB 1992); and In re American Olean Tile Company Inc., 1 USPQ2d 1823, 1825 (TTAB 1986).

The Parties

Opposer, Traditional Medicinals, Inc., was founded in 1974 and Drake Sadler was one of the founders. Opposer imports and blends tea, packages it, and sells it at retail throughout the United States. Opposer sells all varieties of beverage teas and medicinal teas, including herbal teas, green teas and black teas. Opposer's MOTHER'S MILK tea is a traditional herbal formula for nursing women to increase lactation. Opposer first used the mark MOTHER'S MILK for herbal teas in the late 1970s and it has continuously used the mark since that time.

Opposer sells its teas through grocery stores, drug stores, supermarkets, health and natural food stores, nutritional stores (i.e., GNC), and through online or catalog distributors. It advertises in trade publications (e.g., "Health Foods Business Magazine") and consumer publications (e.g., "Medical Self-Care," "Mothering"). From 1999-2004 opposer's sales of its MOTHER'S MILK tea totaled approximately \$2,686,000 (Sadler dep., Exhibit I). Opposer's advertising expenses from 1997-2004 totaled several hundred thousand dollars (Sadler dep., Exhibit F).

The only information of record regarding applicant essentially comes from its application file, which indicates

that applicant, Heartland Brewery, Inc., is a New York corporation located in New York City.⁵

Burden of Proof

In Board proceedings regarding the registrability of marks, our primary reviewing Court has held that the plaintiff must establish its pleaded case, as well as its standing, and must generally do so by a preponderance of the evidence. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000); and *Cerveceria Centroamericana, S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989).

Standing

Standing requires only that a party opposing registration of a mark have a good faith belief that it is likely to be damaged by the registration. See Section 13 of the Trademark Act, 15 U.S.C. §1063. See also, 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §20:7 (4th ed. 2005). The belief in damage can be shown by establishing a direct commercial interest.

⁵ Applicant's argument in its brief (p. 19) that opposer did not submit evidence that applicant sells its beer through retail outlets is not persuasive. While opposer bears the burden of proving its claim as plaintiff in the opposition, a plaintiff is not required to submit evidence regarding the defendant's mark and use or intended use thereof. If applicant wished to have such evidence of record, it could have taken testimony of applicant.

Applicant has applied to register the mark MOTHER'S MILK MAIBOCK for beer claiming a bona fide intention to use the mark in commerce. Opposer uses the mark MOTHER'S MILK for herb teas and dietary and nutritional supplements in the nature of herbal teas; and through the testimony of Drake Sadler (dep., pp. 10-13, Exhibits A and B), opposer made of record its two pleaded registrations for the mark MOTHER'S MILK for those goods. These facts establish opposer's direct commercial interest and its standing to oppose registration of applicant's mark. See *Cunningham v. Laser Golf Corp.*, supra.

Priority

In view of opposer's pleaded registrations for its MOTHER'S MILK mark being of record herein, the issue of priority does not arise in this opposition proceeding. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974); *Massey Junior College, Inc. v. Fashion Institute of Technology*, 492 F.2d 1399, 181 USPQ 272, at footnote 6 (CCPA 1972); and *Carl Karcher Enterprises, Inc. v. Stars Restaurants Corp.*, 35 USPQ2d 1125 (TTAB 1995). Moreover, the record establishes opposer's continuous use of its mark MOTHER'S MILK for herb tea since the late 1970s, well prior to the November 22, 2002 filing date of applicant's application.

Likelihood of Confusion

We turn now to consideration of the issue of likelihood of confusion. Our determination of likelihood of confusion is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities of the marks and the similarities of the goods and/or services. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."). See also, In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). Based on the record before us, we find that confusion is likely.

We consider first the parties' respective marks. It is well settled that marks must be considered in their entirety as to the similarities and dissimilarities thereof. However, our primary reviewing Court has held that in articulating reasons for reaching a conclusion on the question of likelihood of confusion, there is nothing

improper in stating that, for rational reasons, more or less weight has been given to a particular feature or portion of a mark. That is, one feature of a mark may have more significance than another. See *Cunningham v. Laser Golf Corp.*, supra; *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); and *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

The marks are highly similar in sound, appearance, connotation and commercial impression as opposer's mark is MOTHER'S MILK and applicant's mark is MOTHER'S MILK MAIBOCK. Obviously, the only difference in the marks is applicant's addition of the word "MAIBOCK," which is defined in the *thirstbusters.com* glossary (of record in applicant's application, see Trademark Rule 2.122(b)(1)) as "(German) Bock beer of super-premium quality, usually pale, made for the first of May to celebrate spring." Thus, the term "maibock" refers to a type of beer and has been disclaimed by applicant.

MOTHER'S MILK is the dominant (and beginning) element in applicant's mark. The word "Maibock," being a highly descriptive (possibly generic), term in relation to beer, while not ignored in our consideration, is nonetheless of less trademark significance to consumers. See *Cunningham v.*

Laser Golf Corp., supra; and In re Code Consultants Inc., 60 USPQ2d 1699 (TTAB 2001).

Applicant's arguments that the marks are "distinctly dissimilar in sight, sound and commercial impression" (brief, p. 8) are not persuasive. Applicant's mark is identical to opposer's mark except for applicant's addition of the highly descriptive term "Maibock." The addition of such a word to another's mark does not offer a sufficient difference to create a separate commercial impression. See In re Dixie Restaurants Inc., supra. It is the words MOTHER'S MILK, not the descriptive word "Maibock," which dominate the commercial impression created by applicant's mark.

When considered in their entirety, we find that the respective marks are similar in sound, appearance, connotation and commercial impression. See Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); and In re Azteca Restaurant Enterprises Inc., 50 USPQ2d 1209 (TTAB 1999).

The next du Pont factor is the similarity or dissimilarity in the nature of the parties' goods, as identified in the application, and in opposer's proven registrations. It is well settled that goods need not be identical or even competitive to support a finding of likelihood of confusion, it being sufficient instead that

the goods are related in some manner or that the circumstances surrounding their marketing are such that they would likely be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from or are associated with the same source. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001); and *Chemical New York Corp. v. Conmar Form Systems Inc.*, 1 USPQ2d 1139 (TTAB 1986).

Applicant's goods are identified as "beer" and opposer's identified goods are "herb tea" and "dietary and nutritional supplements in the nature of her[b]al teas."

Both parties sell beverages. Although applicant's product is alcoholic and opposer's products are not, opposer has made of record copies of several third-party registrations, all based on use in commerce, as evidence showing that several companies manufacture and sell both alcoholic and non-alcoholic beverages (specifically beer and tea),⁶ under the same marks. See, for example, Registration No. 2471817, with goods in International Classes 29, 30 and

⁶ Applicant argues that if the third-party registrations submitted by opposer are considered, they "simply indicate that teas and beer could be related, not that specialized herb teas (such as Opposer's lactation-aiding herbal tea) are related to beer." (Brief, footnote 1.) This is not correct because in the third-party registrations the broad term "tea" encompasses all types of "tea" including "herb tea."

Opposition No. 91159010

32, for, inter alia, "...herbal tea..." and "...beer...";
Registration No. 2507279, with goods in International
Classes 30 and 32, for, inter alia, "...tea..." and "...beer...";
Registration No. 2240995, with goods in International
Classes 5, 30 and 32, for, inter alia, "...tea..." and "...beer...";
Registration No. 2535175, with goods in International
Classes 29, 30, 31 and 32, for, inter alia, "tea..." and
"beer..."

When considering the third-party registrations, we are mindful that such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them. Such third-party registrations nevertheless have probative value to the extent they serve to suggest that such goods are of a type which emanate from the same source. See *In re Infinity Broadcasting Corp.* of Dallas, 60 USPQ2d 1214 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, footnote 6 (TTAB 1988). Thus, the third-party registrations show that applicant's identified goods and opposer's identified goods may emanate from a single source and be sold under a single mark.

Decisions of this Board and a predecessor Court to our current primary reviewing Court have made clear that in appropriate factual contexts, alcoholic beverages and non-

Opposition No. 91159010

alcoholic beverages may be so related as to be likely to cause confusion when similar marks are used thereon. See Coca-Cola Bottling Co. v. Seagram & Sons, Inc., 526 F.2d 556, 188 USPQ 105 (CCPA 1975)(BENGAL LANCER and design for club soda, quinine water and ginger ale held confusingly similar to BENGAL for gin); Pink Lady Corp. v. L.N. Renault & Sons, Inc., 265 F.2d 951, 121 USPQ 465 (CCPA 1959)(PINK LADY and design for wines held confusingly similar to PINK LADY for, inter alia, fruit juices for food purposes and packaged grapefruit juices for beverage purposes); In re Modern Development Co., 225 USPQ 695 (TTAB 1985)(THE CANTEEN in stylized lettering for wine in cans held confusingly similar to CANTEEN in stylized lettering for, inter alia, ginger ale and root beer); In re Rola Weinbrennerei Und Likorfabrik, 223 USPQ 57 (TTAB 1984)(SUN-APPLE in stylized lettering for apple-flavor alcoholic liqueur held confusingly similar to SUN APPLE in stylized lettering for powdered apple flavor soft drink mix); In re Jakob Demmer KG, 219 USPQ 1199 (TTAB 1983)(GOLDEN HARVEST and design for wines held confusingly similar to GOLDEN HARVEST in stylized lettering for apple cider); and American "76" Co. v. The National Brewing Co., 158 USPQ 417 (TTAB 1968)(FRENCH 76 in stylized lettering ("FRENCH" disclaimed) for malt liquor held confusingly similar to 76 for soft drinks).

We find that applicant's and opposer's identified goods are related products within the meaning of the Trademark Act. See *Hewlett-Packard Company v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) ("even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services"); and *Recot Inc. v. M.C. Becton*, 214 F.3d 1332, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) ("even if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis.").

Regarding the trade channels and purchasers, applicant argues that "the commercial realities demonstrate the different channels of trade used by the two parties." (Brief, p. 19.) However, as acknowledged by applicant (brief, p. 19), there are no limitations in either applicant's or opposer's identifications of goods as to trade channels and/or purchasers. Thus, in this proceeding involving the registrability of applicant's mark, we must presume that the goods travel in all their normal channels of trade and that they are purchased by the same classes of purchasers, which in this case is the public at large. See

Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

Opposer has established that its goods are sold, inter alia, in grocery stores and supermarkets. It is true that applicant's goods are alcoholic and sale is restricted by age. In any event, both parties' goods are sold to the general public, with applicant's, as required by law, limited to adults. Thus, we find that the goods would be offered through the same or at least overlapping channels of trade to the same or at least overlapping consumers.

Turning to the du Pont factor of the number and nature of similar marks in use on similar goods, applicant argues that it "submits numerous registrations evidencing the use of MOTHER'S MILK by various third parties..." In support thereof, applicant refers to the six third-party applications and the six third-party registrations that it made of record through its notice of reliance.

The third-party applications carry no weight as they are evidence only that the applications were filed on particular dates. The six third-party registrations are likewise totally devoid of evidentiary value with regard to this du Pont factor because third-party registrations do not establish that the marks shown therein are in use, or that the public is familiar with them. Thus, we cannot assume that the public will (presumably) come to distinguish

between them. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992); and *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). There is no evidence before us of any use by any third party of any mark including the words "MOTHER'S MILK" for the same or related goods.

Looking next at the du Pont factor of the fame of opposer's mark, opposer argues (brief, p. 16) as follows: "...here there is evidence from the Sadler testimony of extensive sales and advertising expenses since 1977 that establish the fame of Opposer's MOTHER'S MILK mark. Opposer's sales literature, advertisements, and promotional materials include frequent and prominent references to its MOTHER'S MILK tea." Applicant argues that opposer has not established that its mark is famous; and that opposer's mark is entitled to only a narrow scope of protection.

On this record, we agree with applicant that opposer has not established that its mark is famous. The mere length of time a mark has been in use does not establish fame. Opposer's sales and advertising figures for its MOTHER'S MILK herbal teas and supplements covering six years and eight years respectively are not substantial. Simply put, the record herein does not support a finding that opposer's MOTHER'S MILK mark is strong for its herb teas and

dietary and nutritional supplements in the nature of herbal teas.

Applicant argues that opposer's MOTHER'S MILK mark "...should only be afforded a narrow scope of protection due to such common usage in various fields." (Brief, p. 13.)

As mentioned previously herein, applicant introduced six third-party registrations, all of which include the word MOTHER'S MILK in the mark. However, the goods and services identified in those registrations are not relevant in this case (e.g., "educational services, ..."; "breast milk storage system consisting of storage rack, plastic bottles..."; "breast simulation apparatus used to teach or demonstrate breast feeding techniques to expectant mothers"). These third-party registrations do not establish that opposer's MOTHER'S MILK mark is weak for herb teas and/or dietary and nutritional supplements in the nature of herbal teas.

Because we have found that the record does not support a finding that opposer's MOTHER'S MILK mark is famous, and it does not support a finding that it is a weak mark, we therefore accord opposer's MOTHER'S MILK mark the normal scope of protection otherwise afforded to registered marks. We specifically note that opposer's two registrations for the mark MOTHER'S MILK are both registered on the Principal Register with no claim of acquired distinctiveness under Section 2(f) of the Trademark Act in either registration;

and opposer's two registrations are, of course, entitled to the statutory presumptions under Section 7(b) of the Trademark Act.

On balance, and considering all of the evidence on the relevant du Pont factors, and giving each such factor its appropriate weight in the circumstances of this case, we find that purchasers familiar with opposer's MOTHER'S MILK herbal teas and dietary and nutritional supplements in the nature of herbal teas, who then encounter applicant's MOTHER'S MILK MAIBOCK beer, are likely to believe that applicant's goods emanate from or are associated with or sponsored by opposer.

To the extent we have doubt as to the presence of likelihood of confusion, we resolve that doubt against the newcomer (applicant) and in favor of the prior user and registrant (opposer). See *In re Pneumatiques, Caoutchouc Manufacture*, 487 F.2d 918, 179 USPQ 729 (CCPA 1973) ("If there be doubt on the issue of likelihood of confusion, the familiar rule in trademark cases, which this court has consistently applied since its creation in 1929, is that it must be resolved against the newcomer or in favor of the prior user or registrant.") See also, *TBC Corp. v. Holsa Inc.*, 126 F.3d 1470, 44 USPQ2d 1315, 1318 (Fed. Cir. 1997); and *In re Hyper Shoppes*, 837 F.2d 840, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

Opposition No. 91159010

Decision: The opposition is sustained and registration to applicant is refused.